

1 MCGREGOR W. SCOTT
United States Attorney
2 LAUREL J. MONTOYA
Assistant United States Attorney
3 2500 Tulare Street, Suite 4401
Fresno, CA 93721
4 Telephone: (559) 497-4000
Facsimile: (559) 497-4099
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6 Attorneys for Plaintiff
United States of America

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8 IN THE UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 UNITED STATES OF AMERICA,
12
13 Plaintiff,
14 v.
15 MICHAEL JOSEPH ORTEGA,
16 Defendant.

CASE NO. 1:20-CR-118-NONE-SKO

STIPULATION REGARDING EXCLUDABLE
TIME PERIODS UNDER SPEEDY TRIAL ACT;
FINDINGS AND ORDER

DATE: September 21, 2020
TIME: 1:00 p.m.
COURT: Hon. Sheila K. Oberto

17 This case is set for status conference on September 21, 2020. On May 13, 2020, this Court
18 issued General Order 618, which suspends all jury trials in the Eastern District of California until further
19 notice. This General Order was entered to address public health concerns related to COVID-19.
20 Further, pursuant to General Order 611 and 620, this Court's declaration of judicial emergency under 18
21 U.S.C. § 3174, and the Ninth Circuit Judicial Council's Order of April 16, 2020 continuing this Court's
22 judicial emergency, this Court has allowed district judges to continue all criminal matters to a date after
23 May 1, 2020.¹

24 Although the General Order addresses the district-wide health concern, the Supreme Court has
25 emphasized that the Speedy Trial Act's end-of-justice provision "counteract[s] substantive
26

27 ¹ A judge "may order case-by-case exceptions" at the discretion of that judge "or upon the
28 request of counsel, after consultation with counsel and the Clerk of the Court to the extent such an order
will impact court staff and operations." General Order 618, ¶ 7 (E.D. Cal. May 13, 2020).

openendedness with procedural strictness,” “demand[ing] on-the-record findings” in a particular case. *Zedner v. United States*, 547 U.S. 489, 509 (2006). “[W]ithout on-the-record findings, there can be no exclusion under” § 3161(h)(7)(A). *Id.* at 507. And moreover, any such failure cannot be harmless. *Id.* at 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a judge ordering and ends-of-justice continuance must set forth explicit findings on the record “either orally or in writing”).

Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory and inexcusable—General Orders 611, 612, 617, 618, and 620 and the subsequent declaration of judicial emergency require specific supplementation. Ends-of-justice continuances are excludable only if “the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable unless “the court sets forth, in the record of the case, either orally or in writing, its reason or finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.” *Id.*

The General Orders and declaration of judicial emergency exclude delay in the “ends of justice.” 18 U.S.C. § 3161(h)(7) (Local Code T4). Although the Speedy Trial Act does not directly address continuances stemming from pandemics, natural disasters, or other emergencies, this Court has discretion to order a continuance in such circumstances. For example, the Ninth Circuit affirmed a two-week ends-of-justice continuance following Mt. St. Helens’ eruption. *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). The court recognized that the eruption made it impossible for the trial to proceed. *Id.* at 767-68; *see also United States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time following the September 11, 2001 terrorist attacks and the resultant public emergency). The coronavirus is posing a similar, albeit more enduring, barrier to the prompt proceedings mandated by the statutory rules.

In light of the societal context created by the foregoing, this Court should consider the following case-specific facts in finding excludable delay appropriate in this particular case under the ends-of-justice exception, § 3161(h)(7) (Local Code T4).² If continued, this Court should designate a new date

² The parties note that General Order 612 acknowledges that a district judge may make

for the status conference. *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any pretrial continuance must be “specifically limited in time”).

STIPULATION

Plaintiff United States of America, by and through its counsel of record, and defendant, by and through defendant’s counsel of record, hereby stipulate as follows:

1. By previous order, this matter was set for status on September 21, 2020.

2. By this stipulation, defendant and government now move to continue the status conference until November 30, 2020, and to exclude time between September 21, 2020, and November 30, 2020, under Local Code T4.

3. The parties agree and stipulate, and request that the Court find the following:

a) The government has represented that initial discovery in this case includes investigative reports and photographs. A portion of this discovery has been either produced directly to counsel and/or made available for inspection and copying. The government is in the process of making additional discovery available to the defense. .

b) Counsel for defendant desires additional time to review discovery, conduct investigation, and engage in plea negotiations.

c) Counsel for defendant believes that failure to grant the above-requested continuance would deny him/her the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

d) The government agrees with the continuance request and does not object to the continuance.

e) Based on the above-stated findings, the ends of justice served by continuing the case as requested outweigh the interest of the public and the defendant in a trial within the original date prescribed by the Speedy Trial Act.

f) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161,

“additional findings to support the exclusion” at the judge’s discretion. General Order 612, ¶ 5 (E.D. Cal. March 18, 2020).

et seq., within which trial must commence, the time period of September 21, 2020 to November 30, 2020, inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(7)(A), B(iv) [Local Code T4] because it results from a continuance granted by the Court at defendant's request on the basis of the Court's finding that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

4. Nothing in this stipulation and order shall preclude a finding that other provisions of the Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial must commence.

IT IS SO STIPULATED.

Dated: September 16, 2020

McGREGOR W. SCOTT
United States Attorney

/s/ LAUREL J. MONTOYA
LAUREL J. MONTOYA
Assistant United States Attorney

Dated: September 16, 2020

/s/ JOHN F. GARLAND
JOHN F. GARLAND
Counsel for Defendant
MICHAEL JOSEPH ORTEGA

FINDINGS AND ORDER

IT IS SO ORDERED.

Dated: September 16, 2020

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE